UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MIGUEL SOSA, *et al.*,

Plaintiffs,

v.

UTAH LOAN SERVICING, LLC, *et al.*,

Defendants.

Case No. 13-cv-364-W(KSC)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS [DOC. 12]

On February 14, 2013, Plaintiffs Miguel Sosa and Rosa Sosa commenced this action against Defendants Utah Loan Servicing, LLC and Clark Terry for alleged violations of the Fair Debt Collection Practices Act ("FDCPA") and California's Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"). Defendants now move to dismiss Plaintiffs' First Amended Complaint ("FAC"). Plaintiffs oppose.

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS** Defendants' motion to dismiss.

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I. BACKGROUND

Sometime before November 25, 2009, Plaintiffs are "alleged to have incurred certain financial obligations to Mortgage First in the form of a 'junior loan' used by Plaintiffs to purchase a home." (FAC ¶ 25.) The junior loan was used to purchase Plaintiffs' primary residence in October 2005. (Id. ¶ 28.) It was secured by a deed of trust and has never been refinanced. (Id. ¶ 29.)

In September 2006, Plaintiffs fell behind on their loan payments and defaulted. (FAC ¶ 30.) They allege that they "attempted to make a payment on the alleged debt on or about January 2007, however these payments were refused by the creditor." (Id. ¶ 31.) In January 2007, the first loan creditor exercised its powers under the deed of trust, initiated a non-judicial foreclosure, and subsequently sold the home in a trustee's sale. (Id. ¶ 32.) Plaintiffs allege that they were "no longer legally liable for the junior loan" after the foreclosure sale. (Id. ¶ 33.) Plaintiffs' allegations in the FAC indicate that Defendants subsequently "purchased all rights to the defaulted junior loan that did not foreclose." (Id. ¶ 34.)

On or about March 18, 2011, Defendants mailed a letter to Plaintiffs, which was received a few days later, that provided, in part, Plaintiffs' current balance of $84,410.56, and a "one-time special settlement offer of $2,717.97 as payment in full" that would waive the remaining balance of $81,692.59 if accepted. (FAC ¶ 36–37.) The letter also stated the "benefit of payment," which included avoiding legal action (including judgment or garnishment of wages) and negative reporting to credit agencies. (Id.) Plaintiffs allege that the $84,410.56 was in fact not owed and that legal action could not be taken, and thus, the letter constituted deceptive and misleading conduct. (Id. ¶¶ 39–45.)

Defendants then sent another letter dated November 4, 2011, which stated that Plaintiffs owed $65,915.93 on the junior loan. (FAC ¶¶ 46–52.) The letter also included a statement that "the debtor's legal responsibility to pay the debt is not generally affected by a first mortgage foreclosure." (Id. ¶ 48.) Plaintiffs again allege

that the letter contained information that is false, and thus constituted conduct that is deceptive and misleading. (Id. ¶ 48–55.)

Plaintiffs allege that they received four more letters—dated February 16, 2012, January 15, 2013, February 12, 2013, and March 12, 2013—all indicating that Plaintiffs were responsible for a remaining balance on the junior loan. (FAC ¶¶ 56–103.) The exact remaining balance and demands indicated in these letters marginally varied from letter to letter. (Id.) Plaintiffs maintain that the indication that they still were still responsible for the junior loan in each letter—including the March 28, 2011 and November 4, 2011 letters—constituted deceptive and misleading conduct by Defendants. (Id.)

Despite receiving these six letters throughout the course of two years, "[a]t no time after March 18, 2011 did the plaintiffs pay any amount of this alleged debt." (FAC ¶ 100.) Additionally, in March 2013, Plaintiffs learned that neither Defendants nor any of their predecessors "made any negative reporting to the Credit Bureaus[.]" (Id. ¶ 101.)

On February 14, 2013, Plaintiffs commenced this action, asserting claims for violations of the FDCPA and the Rosenthal Act. After Defendants filed a motion to dismiss, Plaintiffs filed a FAC on August 15, 2013, asserting the same two claims. Defendants now move to dismiss the FAC. Plaintiffs oppose.

II. LEGAL STANDARD

The court must dismiss a cause of action for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). The court must accept all allegations of material fact as true and construe them in light most favorable to the nonmoving party. Cedars-Sanai Med. Ctr. v. Nat'l League of Postmasters of U.S., 497 F.3d 972, 975 (9th Cir. 2007). Material allegations, even if doubtful in fact, are assumed to be true. Bell Atl. Corp. v. Twombly,

550 U.S. 544, 555 (2007). However, the court need not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotation marks omitted). In fact, the court does not need to accept any legal conclusions as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal citations omitted). Instead, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient facts under a cognizable theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

III. DISCUSSION[1]

A. Statute of Limitations

An FDCPA claim must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Similarly, any action under the Rosenthal

[1] As a preliminary matter, the Court outright rejects Plaintiffs' assertion that addressing the statute of limitations at this stage is premature. See Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010) ("A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when 'the running of the statute is apparent on the face of the complaint.'")

Act must be brought "within one year from the date of the occurrence of the violation." Cal. Civ. Code § 1788.30(f). As a general rule, "a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action." Magnum v. Action Collection Serv., Inc., 575 F.3d 935, 940 (9th Cir. 2009) (quoting Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1266 (9th Cir. 1998)) (internal quotation marks omitted).

In Naas v. Stolman, 130 F.3d 892, 893 (9th Cir. 1997), the Ninth Circuit held that the statute of limitations in an FDCPA action begins to run on the filing of the complaint when the alleged violation is "the bringing of the lawsuit itself." In reaching that conclusion, the court emphasized that the "result is consistent with other circuit courts' interpretations of the [FDCPA] in which they have held in the analogous nonfiling situation that *the Act's statute of limitations begins to run when a harassing collection letter is mailed*." Id. (citing Maloy v. Phillips, 64 F.3d 607, 608 (11th Cir. 1995); Mattson v. U.S. W. Commc'ns, 967 F.2d 259, 261 (8th Cir. 1992)) (emphasis added). The court continued that "[t]hese courts reasoned that the purpose of the Act is to regulate the actions of debt collectors; because the mailing date was a debt collector's 'last opportunity to comply with the [Act], . . . the mailing of the letters, therefore, triggered section 1692k(d)." Id. Furthermore, "the date of mailing is a date which may be fixed by objective and visible standards, one which is easy to determine, ascertainable by both parties, and may be easily applied." Id. (quoting Mattson, 967 F.2d at 261) (internal quotation marks omitted).

Under either Magnum or Naas, Plaintiffs' claims are barred by the statute of limitations. The violation of the FDCPA and Rosenthal Act occurred when Defendants allegedly engaged in deceptive and misleading conduct. Specifically, they did so by stating in letters that Plaintiffs owed money on the junior loan and that Defendants may pursue legal action if Plaintiffs failed to satisfy the debt, when neither are allegedly true. (See FAC ¶¶ 39–42, 48–53, 58–65, 72–76, 81–86, 90–102; see also Pls.' Opp'n 10:20–25, 13:4–8 ("[T]he whole purpose of these words and phrases is to

mislead and deceive consumers into believing that legal action can be taken").) Under Magnum, Plaintiffs first knew or had reason to know of the alleged misconduct that serves as the basis of this action in March 2011 when Defendants sent their first letter that included the allegedly deceptive and misleading statements. See Magnum, 575 F.3d at 940. Consequently, March 18, 2011 is when the statute of limitations began for Plaintiffs' claims, and it expired one year later on March 18, 2012. See id.; see also 15 U.S.C. § 1692k(d); Cal. Civ. Code § 1788.30(f). It does not begin, as Plaintiffs argue (Pls.' Opp'n 5:7–6:2), at some point of Plaintiffs' choosing just because a letter addressing the same alleged misconduct was sent within the last year. See Magnum, 575 F.3d at 940. The Court reaches the same conclusion under Naas because the March 18, 2011 letter is the first "harassing letter" that Defendants sent to Plaintiffs. See Naas, 130 F.3d at 893; see also 15 U.S.C. § 1692k(d); Cal. Civ. Code § 1788.30(f).

Given that the statute of limitations began on March 18, 2011 and this action commenced almost two years later on February 14, 2013, Plaintiffs' claims for violations of the FDCPA and Rosenthal Act are time-barred. See 15 U.S.C. § 1692k(d); Cal. Civ. Code § 1788.30(f); Magnum, 575 F.3d at 940; Naas, 130 F.3d at 893.

B. Continuing Violation Doctrine

Courts have held that the "continuing violation" doctrine applies to debt-collection claims under appropriate circumstances. Joseph v. J.J. Mac Intyre Companies, L.L.C., 281 F. Supp. 2d 1156, 1161 (N.D. Cal. 2003); Komarova v. Nat'l Credit Acceptance, Inc., 175 Cal. App. 4th 324, 344 (2009). The doctrine permits recovery "for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period[.]" Komarova, 175 Cal. App. 4th at 343 (quoting Richards v. CH2M Hill, Inc., 26 Cal. 4th 798, 812 (2001)) (internal quotation marks omitted). "The key is whether the conduct complained of constitutes a continuing pattern and course of conduct as opposed to unrelated discrete acts." Joseph, 281 F. Supp. 2d at 1161. "If there is a pattern, then

the suit is timely if the action is filed within one year of the most recent date on which the defendant is alleged to have violated the FDCPA, and the entire course of conduct is at issue." Id. (citation and internal quotation marks omitted). Debt collection activities, such as "a phone call at midnight, or a threatening call to a consumer's employer," are discrete acts, but "repeated harassing phone calls" may constitute a continuing pattern. Komarova, 175 Cal. App. 4th at 344.

After reciting the doctrine presented in Joseph, Plaintiffs continue that

> Defendant argues that in the case of letters with the same general threat, Plaintiff is prohibited from bringing a claim unless brought within one year of the very first communication. In support of this contention Defendants [sic] cite several out-of-state district court decisions which have not been widely followed. The court in Joseph referenced a New York case where the court implied that it would allow a continuing violation argument, based on a series of threatening letters, each of which violate the FDCPA and only some of which are time-barred.[] The situation discussed in Sierra is what we have here, a series of threatening letters, each of which violate the FDCPA.

(Pls.' Opp'n 4:24–5:6 (citation omitted).) That is the entirety of Plaintiffs' "argument" invoking the continuing violation doctrine.

After reviewing Sierra v. Foster & Garbus, 48 F. Supp. 2d 393, 395 (S.D.N.Y. 1999), it is unclear how that case supports Plaintiffs' argument. In fact, in Sierra, the court explicitly states that it "is not a case where defendants have sent a series of threatening letter, each of which violate the FDCPA and only some of which are time-barred[,]" but rather the violation is the "unfair and illegal" attorneys' fees authorized by an agreement that the plaintiff breached. Sierra, 48 F. Supp. 2d at 395. Sierra simply is not relevant here.

Plaintiffs also cite Joseph to support their continuing-violation argument. Joseph involved a debt-collection agency that made over 200 calls to the plaintiff's residence during a nineteen-month period, several of which were made after the plaintiffs clearly instructed the defendant to not call her anymore. Joseph, 281 F. Supp. 2d at 1161-62. Approximately 75 of the 200 calls were within the limitations period. Id. The court eventually concluded that "there were still a sufficient number of calls over a two-and-

one-half year period to constitute a pattern of related conduct, triggering the continuing violation doctrine." Id. The alleged misconduct here—sending six letters over a two-year period—is a stark difference from the misconduct found in Joseph. See id.

An appropriate "continuing pattern" or "course of conduct," like those described in the cases cited by Plaintiffs, cannot be found based on the facts alleged in this case because Defendants' activities toward Plaintiffs are more akin to discrete acts over an extended period of time. See Basich v. Patenaude & Felix, APC, No. 11-cv-4406, 2013 WL 1755484, at *5-6 (N.D. Cal. Apr. 24, 2013). The facts here show a rather limited amount of contact over a two-year period. Therefore, Plaintiffs fail to show that the continuing violation doctrine applies here.

IV. CONCLUSION & ORDER

In light of the foregoing, the Court **GRANTS** Defendants' motion to dismiss and **DISMISSES WITH PREJUDICE** Plaintiffs' FAC in its entirety. See Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011) ("[A] district court may dismiss without leave where . . . amendment would be futile.").

IT IS SO ORDERED.

DATE: January 10, 2014

HON. THOMAS J. WHELAN
United States District Court
Southern District of California